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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 521

FRANKS BROS. COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 138–148) is reported in 137 F. (2d) 989. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 3–28) are reported in 44 N. L. R. B. 898.

JURISDICTION

The decree of the circuit court of appeals (R. 148) was entered on July 27, 1943. A petition for rehearing filed by petitioner was denied on September 13, 1943 (R. 149). The petition for a writ of certiorari was filed on December 4, 1943, and was granted on January 10, 1944 (R. 152). The

jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question presented is whether the Board, having found that petitioner had interfered with the self-organization of its employees and had refused to bargain collectively with a labor organization designated by a majority of the employees in an appropriate unit (45 out of 80), may properly order petitioner to bargain with that labor organization, although prior to the issuance of the Board's order, as a result of a turnover in normal business course among a minority of the employees in the unit, the number of employees who designated the labor organization remaining in petitioner's employment constituted less than a majority of the employees in the unit (32 out of 85).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix A, *infra*, pp. 46–47.

STATEMENT

Petitioner, a Massachusetts corporation, is engaged at Lawrence, Massachusetts, in the manufacture, sale, and distribution of men's clothing

(R. 100). In January 1941, the Union[1] began to seek members among its employees (R. 68), and by June 9, 1941, had been designated as collective bargaining representative by 45 of petitioner's 80 production and maintenance employees (excluding executives, supervisors, and clerks) (R. 58–59, Resp. Exh. 1, R. 129; R. 66, Bd. Exh. 10, R. 125; R. 68–70, Bd. Exhs. 12–3 to 12–27, 12–29 to 12–45, R. 102, 103, 125–129, 110–112; R. 95–96, Bd. Exh. 22, R. 105–106), an appropriate bargaining unit (R. 13–16).[2] The Union thereupon sought to initiate collective bargaining with petitioner, but at a meeting on June 12 and again during the following week, the latter refused to bargain and advised the Union's rep-

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[1] Amalgamated Clothing Workers of America, affiliated with the Congress of Industrial Organizations.

[2] The number in the unit was determined by deducting from the total number of 94 names listed on an exhibit prepared by petitioner's bookkeeper and showing the persons on each of petitioner's weekly pay rolls during the period from May 29 to July 31, 1941 (R. 95–96, 105–106, Bd. Exh. 22), 7 supervisory or clerical employees (Anna Darwesh, Shemovan (Sam) Perperian, Luke Krikorian, Ruth Kiesling (Lanouette), Jacob Friedman, Harry Yosper, and Minnie Yosper), 5 persons whose names appear thereon as having been hired after June 12 (Mary Zasso, Wave Cram, Olive Clark, Rose Hatem, and Theo. Proulx), and 2 persons whose names appear thereon as having left petitioner's employ before June 5 (Elio Melucci and Joseph Tarallo (R. 16, note 17)). The Board found (R. 16) that the Union had been designated by 46 of the employees, apparently erroneously including in the number Elio Melucci, whose designation is in evidence (Bd. Exh. 12–28) but who was not employed in the unit on June 9.

resentatives that the "best" thing to do was to leave petitioner alone for the next 6 months (R. 40–41, 43–48, 50–53, 90–91). The Union thereupon filed with the Board a petition for an investigation and certification of representatives, and subsequently entered into an agreement with petitioner for a consent election to be conducted by the Board on July 25 (R. 62, 64, 66, 68, 79, Bd. Exhs. 6 and 9). During the week preceding the scheduled election petitioner engaged in a campaign of hostile activities against the Union during which supervisory employees threatened that if the Union won the election petitioner would close its plant (R. 78–79, 80, 81–82, 84–89, 98–99, 104, 107, 108, 113), declared that the Union was "no good" (R. 80), and attempted to persuade employees to withdraw their support from the organization (R. 59–60). Principally as a result of these activities, the Union refused to proceed with the election (R. 73–74, 85–87, 89). Thereafter petitioner continued its anti-union activities and threats of disaster if the Union "got in" (R. 55–56, 57–58, 75–78, 79–80, 83–84, 95, 130), and resisted Board efforts to have it post a notice in the plant, advising the employees, among other things, that "there will be no shutdown of the plant caused by employees selecting a union" (R. 91, 115–118, Resp. Exhs. 14, 14a, 17, R. 131–132).[3] The Board found that the

[3] The proposed notice was to be posted in adjustment of unfair labor practice charges. Petitioner insisted that a pro-

foregoing activities constituted unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 18–20, 27).

Following petitioner's unlawful acts and while the case was pending before the Board in regular course, there was a normal business turnover among a minority of the personnel in the unit. During this turnover, as appears from petitioner's pay roll for the week ending March 5, 1942, which it introduced in evidence (R. 113–115; Resp. Exh. 22, R. 132–134),[4] 23 of the 80 employees in the unit, of whom 13 were among the 45 who had designated the Union, left petitioner's employ,[5] and 28 new persons were hired in the unit, so that only 32 of the employees who had designated the Union were included among the 85 employees then in the unit.[6] Petitioner claimed before the Board

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visо be added: "However, if the union wins their election and makes excessive demands on the company, the company may cease operations and close the plant" (R. 91–93; Resp. Exh. 17, R. 132). Petitioner's officer admitted at the hearing that it had no reason to believe the union would make excessive demands, that its business was in a sound state, and that it did not otherwise contemplate the discontinuance of the business (R. 93–95).

[4] This is the pay roll which includes the period immediately preceding issuance of the Board's complaint on March 2, 1942.

[5] At least one (R. 82) was discharged (R. 23–25) and two (R. 109, Tr. 164, 168) entered the armed forces (R. 16, note 16).

[6] See R. 113–115, 132–134.

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that this circumstance precluded the normal bargaining order requiring it to deal with the Union (R. 25–26, n. 24). The Board considered the effect to be given petitioner's showing in this regard, but decided that "this alleged loss of majority" should not be "determinative of the remedy." It found that "the only means" by which petitioner's refusal to bargain could be remedied and the policies of the Act effectuated was by an order requiring petitioner to deal with the Union which represented a majority at the time the unfair labor practices were committed (R. 25–26, n. 24). The Board concluded that as a matter of law the Union had at all times since its designation been and still was the exclusive representative of petitioner's employees (R. 18, 26–27). The Board therefore, ordered petitioner to cease and desist from its violations of the Act, upon request to bargain collectively with the Union, and to post appropriate notices of compliance (R. 27–28).

Thereafter the Board filed in the court below a petition for enforcement of its order (R. 135–137) and on July 27, 1943, the court handed down its opinion (R. 138–148) and entered its decree (R. 148) enforcing the Board's order. On January 10, 1944, this Court granted petitioner's petition for certiorari to review the propriety of the affirmative bargaining order (R. 152).

SUMMARY OF ARGUMENT

The Board properly ordered petitioner to bargain collectively with the Union despite a showing that sufficient of the employees who had designated the Union had left petitioner's employment so that it no longer retained an actual majority status.

This Court has uniformly held even in cases in which employees were urging that they no longer desired to be represented by the union with which the employer refused to bargain, that it is for the Board and not the courts to determine whether the employer should still be required to bargain with that union. *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82. The rationale, which underlies all of the cited cases, is that an employer's unfair labor practices have a deterrent effect upon employees joining or remaining members of labor organizations; that while this discouraging effect is operative, the existence of other factors in the situation which might also be thought to obscure or destroy the representative status of the union with which the employer has refused to bargain, does not preclude the Board from tracing the change to the unfair labor practices; and that an order to bargain is an appropriate remedy for a

refusal to bargain. The validity of these considerations as applied to the facts of the instant case is readily apparent.

Petitioner's refusal to bargain and its campaign against the Union disrupted the morale of the employees who had already joined. They found their objective in joining, that is, to obtain collective bargaining, frustrated, and membership not only futile but threatening to their jobs. For similar reasons the refusal to bargain made it difficult for the Union to secure recruits among the old employees who had previously not joined or among the new employees who later entered petitioner's employ. Moreover, if petitioner had bargained, it is probable that one of the purposes of the Act, the making of a collective-bargaining agreement, would have been achieved. Such a contract would have given the Union a powerful impetus to further organization. In these circumstances it would be arbitrary to assume that the Union would have lost its majority if petitioner had dealt with it as the law required; accordingly, the Board could reasonably conclude, as the court below held (R. 147), that but for petitioner's illegal conduct the Union probably would have retained its majority status by accessions despite the loss of members resulting from normal labor turnover.

Even in the absence of an unfair labor practice, employers are often required to bargain with

representatives which are not the actual choice of a majority of the employees in the unit at the time the bargaining takes place. The system of collective bargaining established by the Act would be rendered unworkable if every change in sentiment among the employees or every change in personnel in the unit required a new determination of the bargaining representative. There is thus nothing improper in requiring petitioner as a remedy for its unfair labor practices to bargain with the last freely chosen representative of its employees.

ARGUMENT

THE BOARD'S ORDER REQUIRING PETITIONER TO BARGAIN COLLECTIVELY WITH THE UNION IS VALID

The instant case is another in the long line of cases in which an employer who has refused to engage in collective bargaining with his employees' properly designated representative seeks to derive some advantage from his illegal conduct by contending that he should be permitted to continue to refuse to deal with the organization because subsequent events have obscured or destroyed its continued majority status.[7] In the

[7] *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249, 252 (C. C. A. 1); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 690–691 (C. C. A. 1); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 880

instant case the subsequent events upon which the employer relies for this purpose are the fact

(C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 956 (C. C. A. 2); *National Labor Relations Board* v. *Karp Metal Products Co.*, 134 F. (2d) 954 (C. C. A. 2), bargaining order (42 N. L. R. B. 119, 153–155; 51 N. L. R. B. 621) enforced without opinion, October 23, 1943, pending on certiorari, No. 602, this Term; *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2), certiorari granted, No. 265, this Term; *National Labor Relations Board* v. *A. Sartorius & Co.* (not yet reported), decided January 31, 1944 (C. C. A. 2); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. (2d) 32, 39 (C. C. A. 3); *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *National Labor Relations Board* v. *Poultrymen's Service Corp.*, 138 F. (2d) 204, 211 (C. C. A. 3); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 618 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 640 (C. C. A. 4); *Great Southern Trucking Co.* v. *National Labor Relations Board* (on contempt) (not yet reported), decided January 10, 1944 (C. C. A. 4); *National Labor Relations Board* v. *Dixie Motor Coach Corp.*, 128 F. (2d) 201, 202 (C. C. A. 5); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5); *National Labor Relations Board* v. *Porcelain Steels, Inc.*, 138 F. (2d) 840 (C. C. A. 6); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. (2d) 618, 621 (C. C. A. 6); *National Labor Relations Board* v. *Swift & Co.*, 127 F. (2d) 30, 32 (C. C. A. 6); *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 758 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 437–438 (C. C. A. 7); *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 765 (C. C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *Blanton Co.*, 121 F. (2d) 564.

that during the normal interval which necessarily elapsed between petitioner's original refusal to bargain and the time of the Board's complaint and hearing, there occurred in regular business course a turn-over among a minority of petitioner's employees so that the Union, whose majority status petitioner had originally refused to respect, ceased to retain that status.

Petitioner's argument is that in these circumstances the principles established by this Court in *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318; and *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, are inapplicable and the case is controlled by *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

The court below rejected petitioner's contention. It held (R. 148) that "The fact that it may be shown that by lapse of time the union had been unable to retain its majority, is not a sufficient

369 (C. C. A. 8); *Busmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 788 (C. C. A. 8); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. (2d) 263, 267 (C. C. A. 8); *National Labor Relations Board* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 254 (C. C. A. 8); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 198 (C. C. A. 9); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 480–481 (C. C. A. 10), certiorari denied in this respect, 311 U. S. 637; *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, 121 F. (2d) 165, 175–176 (C. C. A. 10).

basis for refusing to order affirmatively that the [petitioner] bargain with the union"; and that "the language of the Supreme Court in the *Lorillard* case compels us to affirm the Board once it has reached [the] conclusion" that such an order is necessary "in order to effectuate the purposes of the Act."

We submit that the holding of the court below is correct and that in the instant case there are even more compelling reasons for enforcing the Board's order than were present in the *Lorillard* case and the earlier decisions, for here no employee has objected to representation by the union, whereas in each of those cases another labor organization had been chosen as their representative. We shall first review briefly the facts and holdings in the *Lorillard* and antecedent cases, and then demonstrate that the scope of the holdings in those cases embraces the instant case and that petitioner's attempt to distinguish them is without substance. Finally, we shall show that the *Fansteel* and *National Seal* cases on which petitioner relies are inapposite.

1. ***The facts and holdings in the Lorillard and antecedent cases.***—In the *Lorillard* case an unaffiliated association formed after the unfair labor practices occurred sought to intervene before the Board and establish that it was the statutory representative of the employees. The employer as a

result urged that he should not be obliged to bargain with the first statutory representative until its status was determined by an election because, as appeared from the intervening association's petition, the first representative had lost its majority status for reasons unrelated to the company's unlawful acts. In that case the asserted reasons for the alleged loss of majority were the lapse of time between the date of the union's established majority status and the issuance of the Board's decision and order, and the fact that in the interval a strike accompanied by violence had occurred, during which some 650 employees, who constituted a majority of the bargaining unit, had left the union and had formed the intervening association.

The Board held, just as it did in the instant case (R. 25–26, n. 24), that despite this circumstance an affirmative bargaining order was necessary to effectuate the policies of the Act and to remedy the situation resulting from the employer's original illegal refusal to bargain (16 N. L. R. B. 684, 700). It pointed out, quoting from its earlier decision in *Matter of Inland Steel Company*, 9 N. L. R. B. 783, 815–816, that—

> The necessary delays incident to the adjudication of a dispute have postponed the Board's order until a time considerably subsequent to the original wrongful refusal to bargain. The refusal to bargain collec-

> tively disrupts the morale of the men, has a deterring effect upon the organizational activity of the union and a discouraging influence on members already gained which tends to induce them to drop from the ranks. * * * If an order to bargain collectively cannot be deemed an appropriate remedy for the refusal to bargain collectively unless the [union's] majority is kept intact until the Board can issue a decision, * * * the [employer] would be permitted further to evade the obligation of Section 8 (5) by profiting from the discouraging effects of its already accomplished violation of that very obligation.

Accordingly, the Board concluded that by requiring the employer to bargain with the union, it would (16 N. L. R. B. at p. 700)—

> * * * disregard any effect the unfair labor practices may have had upon the status of [the union] as majority representative and [would] restore the situation existing at the time of the refusal to bargain, as far as possible.

Upon the Board's petition for enforcement of its order, the circuit court of appeals, as appears from the face of its opinion, entertained the view for which petitioner in the instant case contends. It distinguished, as petitioner here seeks to do (Br. 6–7), the *Machinists* and *Bradford Dyeing* cases in which as it thought, "No circumstances were alleged giving reasonable grounds

for believing that the union was no longer the choice of a majority of the employees; the reasonable inference was that the employer had exercised some coercion" (117 F. (2d) 921, 925), and it held in substance, citing the *Fansteel* decision, that where circumstances did appear demonstrating a "shift in sentiment * * * caused by other factors than the employer's refusal to bargain collectively" (117 F. (2d) 921, 925), the Board could not trace the loss of majority to the employer's illegal conduct and could not validly require the employer to remedy his refusal to bargain by an order to bargain. The circuit court thought that "lapse of time" and a "change in the conditions" due to the strike and accompanying violence presented such circumstances, for, it declared, "the cessation of employment and the violence engendered in the course of the strike would have the natural result of alienating members from the union," and the lapse of time made it "still more problematical whether the union [still] represents the majority of the employees" (117 F. (2d) 921, 925). Accordingly, it conditioned enforcement of the Board's bargaining order upon the holding of an election to determine that question (*ibid.*).

This Court reversed the decision. In a *per curiam* opinion, the Court stated (314 U. S. 512, 513):

> The Board had considered the effect of a possible shift in membership, alleged to

> have occurred subsequent to Lorillard's unfair labor practice. But it had reached the conclusion that, in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain. This was for the Board to determine, and the court below was in error in modifying the Board's order in this respect. *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340; *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 82. * * *

In the *Bradford Dyeing* case, cited in the *Lorillard* opinion, the Board had found (4 N. L. R. B. 604, 616–617, 618) that the union's loss of majority subsequent to the refusal to bargain was attributable to the refusal to bargain and other unlawful acts, and it had ordered the employer to remedy the refusal by bargaining. This Court upheld the Board's findings tracing the loss of majority to the illegal conduct, and ruled that the Board could properly disregard this loss because the unfair labor practices of the employer "cannot operate to change the bargaining representative previously selected by the untrammelled will of the majority" (310 U. S. 318, 339–340).*

* Lapse of time was also urged by the employer in that case as accounting for the union's loss of majority (Brief for respondent, No. 588, October Term, 1939, p. 68), but this factor was not noticed in the opinion of this Court.

In the *Machinists* case, likewise, the Board had refused "to recognize petitioner's notice of change" (311 U. S. 72, 82) of sentiment among the employees after the unfair labor practices. This Court stated that this was "wholly proper," citing the *Bradford Dyeing* case (*ibid.*). It pointed out that the true wishes of the employees could only be determined "after [the] unfair labor practices have been removed as obstacles to the employees' full freedom of choice" (311 U. S. 72, 83), and that "how the effect of prior unfair labor practices may be expunged" is for the "expert judgment" of "the Board, not the courts" (311 U. S. 72, 82). And it stated (*ibid.*)—

> It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates.* * * *

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*Lapse of time and a jurisdictional strike were also urged in the *Machinists* case as accounting in part for the union's alleged loss of majority (Brief for appellants, No. 16, October Term, 1940, pp. 8–9, 12–13, 41–46, 51), but these circumstances were likewise not adverted to by this Court in its opinion.

2. *The scope of the Lorillard and earlier decisions embraces the instant case.*—It is, we think, apparent from the foregoing statement of the facts and holdings in the *Lorillard, Machinists,* and *Bradford Dyeing* cases, that the scope of those decisions embraces the instant case. Those cases obviously proceed upon the basis that an employer's unfair labor practices have a deterrent effect upon employees joining or continuing their membership in labor organizations; that while this discouraging effect is operative, the existence of other factors in the situation which might also be thought to affect the representative status of the union does not preclude the Board from tracing the change to the unfair labor practices (cf. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105); that the precise or probable weight of these other factors as compared to the unfair labor practices cannot be isolated and separately evaluated, and it is for the employer, as the wrongdoer, to disentangle the consequences of his wrong for which he is responsible from those for which he is not (cf., *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585); and that an order to bargain is an appropriate remedy for a refusal to bargain.[10]

[10] The considerations which support the Board's affirmative bargaining order have been stated from time to time in

These considerations are as fully applicable to the facts of the instant case as they were to the facts of the *Lorillard* case. In the instant case, the "other factors than the employer's refusal to bargain" which are advanced as alleged reasons for the loss of majority are a normal turnover among some of the employees in the unit. But whether such turnover or the strike and violence in the *Lorillard* case be the "other factors," in either case the employer's refusal to bargain with the union has a discouraging effect upon the employees' joining or remaining in the organization. It deprives the union of its only purpose for being and the employees of their only purpose in joining it, viz, to secure collective bargaining. And it is equally true in either case, that while this discouraging effect is operative, the precise or probable weight of the "other factors" which might be thought also to obscure or

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the Board's decisions, e. g., *Matter of Bradford Dyeing Ass'n*, 4 N. L. R. B. 604, 616–617, 618; *Matter of P. Lorillard Co.*, 16 N. L. R. B. 684, 699–700; *Matter of Medo Photo Supply Corporation*, 43 N. L. R. B. 989, 999; *Matter of Karp Metal Products Co.*, 51 N. L. R. B. 621, and have been argued to this Court on three preceding occasions. *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, No. 588, October Term 1939, Brief for the National Labor Relations Board, pp. 39–60, Reply Brief, pp. 14–17; *International Association of Machinists* v. *National Labor Relations Board*, No. 16, October Term 1940, Brief for the National Labor Relations Board, pp. 62–78; the *Lorillard* case, No. 71, October Term 1941, Brief for the National Labor Relations Board, pp. 10–27.

destroy the representative status of the union cannot be isolated and separately evaluated. And, of course, in either case an order to bargain is an appropriate remedy for a refusal to bargain.

In the instant case petitioner's "dilatory tactics, its refusal to recognize the union as a bargaining representative, and its campaign against the union" (opinion of the court below (R. 147)), including threats and warnings that the plant would close if the Union "got in," obviously disrupted the morale of the employees who had already joined it, and discouraged their active support of it, for they found their objective in joining frustrated and membership not only futile but threatening their jobs. Indeed, it was principally because of this interference and the fears engendered among the employees, that the Union decided not to continue with the election although it had previously obtained the adherence of a majority of the employees (*supra*, p. 4). Likewise, this unlawful activity of petitioner made it difficult or impossible for the Union to secure recruits among the old employees who had previously not joined, for it emphasized to them the dangers and futility of membership. It also made it more difficult or even impossible for the Union to secure adherents among the new employees who in normal business course entered petitioner's employ. It cannot be assumed that these new employees did not learn of petitioner's

attitude which had the same discouraging effect upon their affiliation as it had upon the old employees toward whom petitioner's unlawful conduct had been immediately directed. It is noteworthy in this regard that petitioner had refused to post a notice to its employees assuring them in unequivocal terms that there would be no shut-down of the plant caused by the employees joining the Union (*supra*, p. 4). And quite naturally, new employees coming to work for petitioner would be far more reluctant to join the Union in the circumstances than they would if it were operating as a "going concern" in bargaining with petitioner.

Moreover, it is reasonable to believe, as the Act assumes (Section 1), that if petitioner had dealt with the Union as the law requires, the parties would have concluded a collective bargaining agreement.[11] Such a contract would have given the Union an impetus which petitioner's illegal tactics denied it. This Court pointed out in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267, that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of

[11] See *Consolidated Edison* v. *National Labor Relations Board*, 305 U. S. 197, 236; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514.

employees * * *." Cf. *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 568–569. And two authorities in the labor relations field have noted (Reynolds, Lloyd G., and Killingsworth, Charles C., *The Union Security Issue,* Annals of the American Academy of Political & Social Science, vol. 224, Nov. 1942, pp. 32, 38):

> Where labor turnover is high the union's majority may be diluted rapidly by a continued influx of nonunion men into the plant. * * * Union officers generally appear to believe, however, that this inadequacy is not serious. When the union has no strong rivals in the plant, when it commands a safe majority, and when it enjoys contractual relations with the employer, it is usually not very hard to persuade a majority of new employees to sign up.[12]

In the instant case, moreover, so far as appears, the Union has been able to retain the adherence of 32 of the 85 employees in the unit, despite petitioner's uncorrected refusal to bargain and threats of reprisal, and it needed to recruit only 11 of the

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[12] See, also, Feller, Alexander, and Hurwitz, Jacob E., *How to Deal with Organized Labor* (N. Y. 1937), pp. 6–7; Cummins, E. E., *The Labor Problem in the United States* (N. Y. 1935), p. 207; Stein, Emanuel, and Davis, Jerome, *Labor Problems in America* (N. Y. 1940), p. 664; Slichter, Sumner, *The Government and Collective Bargaining,* Annuals of the American Academy of Political & Social Science, vol. 118, March 1935, pp. 107, 116.

53 non-members to retain its majority. Furthermore, of the 85 employees in the unit, 57 were in petitioner's employ at the time of the original refusal to bargain, of whom 25 were old employees who had not joined the Union. Moreover, disregarding new employees, a majority of the old employees in the unit are still union members. (*supra*, p. 5). We submit that in these circumstances it would be wholly arbitrary to assume that the Union's majority status would not have continued if petitioner had acted lawfully and obeyed the command of the statute,[13]

Accordingly, the court below was entirely correct in applying (R. 147) the doctrine of the *Lorillard, Machinists,* and *Bradford Dyeing* cases to the instant case. It correctly held (R. 147) that petitioner's—

> dilatory tactics, its refusal to recognize the union as a bargaining representative, and its campaign against the union deprived it of the opportunity of strengthening its organization. It demonstrated the union's inability to reach an agreement with the employer with the result that as time went

[13] It may be noted that none of petitioner's employees, either in person or through a competing union, has questioned the Board's finding that the Union at all times since it first sought to bargain has been and still is the exclusive representative of all the employees in the appropriate unit (R. 18, 26–27). Cf. *National Labor Relations Board* v. *National Mineral Co.*, 134 F. (2d) 424, 426 (C. C. A. 7), certiorari denied, No. 208, this Term; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5).

> on the enthusiasm of its members waned and it made it more difficult for the union to capture the allegiance of other employees, either old employees who had previously not joined, or new employees who came in after the unfair labor practices were committed.

and that (R. 147)—

> The Board might reasonably conclude that had the union been recognized and installed as bargaining representative of the employees, as the law required, it probably would have retained its majority status by accessions from these sources, despite its loss of members resulting from normal labor turn-over.

Four recent circuit court decisions, in addition to the decision in the instant case, squarely support the foregoing views. *Great Southern Trucking Company* v. *National Labor Relations Board* (contempt proceedings), not yet reported, decided January 10, 1944 (C. C. A. 4); *National Labor Relations Board* v. *Porcelain Steels, Inc.*, 138 F. (2d) 840 (C. C. A. 6); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. (2d) 618, 621 (C. C. A. 6); *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249, 252 (C. C. A. 1). See also *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2), certiorari granted, No. 265, this Term; *National Labor Relations Board* v. *Karp Metal Products Co., Inc.*, order dated October 23, 1943 (C. C. A. 2), enforcing without opin-

ion 51 N. L. R. B. 621, pending on certiorari, No. 602, this Term; *National Labor Relations Board* v. *A. Sartorius & Co.*, decided January 31, 1944 (C. C. A. 2). In each of these cases, the Circuit Court of Appeals, relying upon the *Lorillard* and antecedent cases, upheld the Board's power to remedy a refusal to bargain by an order so to do, despite the employer's contention that the union had subsequently lost its majority due to a normal turnover in employee personnel. There are no decisions since *Lorillard* to the contrary.[14]

In the *Great Southern Trucking* case, which arose upon the Board's petition to adjudge the employers in contempt for failing to bargain with a union, as required by the Board's order previously enforced by the court (127 F. (2d) 180, certiorari denied, 317 U. S. 652), it appeared that the employers sought, as the court stated in its opinion, "to extricate themselves from the plight of their own wrong doing, * * * on the ground that the Union has lost its majority status * * * after the entry of our decree * * *." The court nevertheless held the employers in contempt, stating—

> While it is true that the loss of majority in the instant case occurred, not among the employees composing the original working force of the Company, but rather among the changed personnel composed largely of

[14] We discuss below (pp. 38–40) the cases which petitioner cites to the contrary, but which we think are not in point.

> new employees who replaced the discharged employees, the principle that the union is entitled to a reasonable presumption of the continuity of its majority status and an employer may not profit by its own wrong doing is nonetheless applicable.
>
> The failure of the Company to take the curative action dictated by us necessarily must have had a telling impact on the new employees. Indeed, had the Company acted lawfully and obeyed the command of our decree by recognizing and bargaining with the Union, the Union probably would have recruited in its ranks a proportionate share of adherents from the new employees.

In the *Porcelain Steels* case, precisely as here, the employer introduced evidence at the hearing before the Board tending to show that the union at that time did not represent a majority of the employees in the unit. The court nevertheless enforced the Board's bargaining order. It specifically approved the Board's inference that, "except for the unfair labor practices of the respondent, the Union 'would have been able to recruit from among the new employees a sufficient number to maintain its majority.'" 138 F. (2d) 840, 841. The court briefly reviewed the *Bradford Dyeing, Machinists,* and *Lorillard* decisions of this Court and declared that the contentions of the employer to the contrary, "are in direct contravention of [these] adjudications * * *." 138 F. (2d) at pp. 841–842. Likewise, in the *Burke*

Machine Tool case, the court stated (133 F. (2d), at 621):

> * * * the Board was entitled to conclude, as it fairly appears to have done * * *, that such loss could not be separated from the unfair labor practices and that the effect of the refusal to bargain should be remedied by affording the employees an opportunity to restore the status quo. *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82; *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 339, 340.

And in the *Karp Metal Products* case, which petitioner cites (Br. 8, 14), the court enforced an order to bargain collectively despite a subsequent turnover in the employer's personnel which probably removed the union's majority.

In view of the foregoing, there clearly is no merit in petitioner's suggestion (Br. 10) that, "Since at the time of the hearing the Union did not represent a majority, it would be an injustice to the employees to establish an exclusive bargaining representative for them." The inference is permissible that but for petitioner's illegal conduct, the Union would still enjoy the continued adherence of the majority. Moreover, as the Circuit Court of Appeals for the Fourth Circuit pointed out in the *Great Southern Trucking Company* case, *supra,* the bargaining order does not grant the Union a permanent status as

representative, or status for any fixed period of time. On the contrary, should the employees, after conditions permitting a free choice have been restored, really desire different representation, the Act provides adequate machinery "in order to guarantee that their genuine desires can be ascertained and respected." See also, the *Machinists case*, 311 U. S. at 83; and *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 497, 498–499 (C. C. A. 3), certiorari denied, 315 U. S. 797. "But until the Company purges itself of its unlawful conduct * * *, the employees' true desires 'are matters of speculation and argument.' *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 872 (C. C. A. 5th, 1940), certiorari denied, 310 U. S. 651 (1940)." The *Great Southern Trucking* case.[15]

3. *Petitioner's attempts to distinguish the Lorillard and antecedent cases.*—Petitioner does not attempt to show that the foregoing considerations lose their force when applied to the facts of the instant case, or that it is unreasonable to believe that if it had bargained with the Union, that organization would have been able to recruit other

[15] In four of the cases in which courts have enforced Board orders requiring an employer to bargain with a union which has assertedly lost its majority, the Board subsequently conducted elections to determine the true choice of the employees. See the cases of *Biles-Coleman*, *Louisville Refining* (102 F. (2d) 678 (C. C. A. 6)), *Blanton*, and *Ritzwoller*, and footnotes f, h, and i in Appendix B, *infra*, p. 50.

members among the old employees or to absorb new accretions of personal, sufficient to maintain its majority status.[16] But it seeks to distinguish the *Lorillard* decision upon the basis that (Br. 7–8)—

> In the *Lorillard* case the record did not disclose that the union had lost its majority because of loss of membership due to the fact that employees had voluntarily quit. There, *after the hearing had been closed* and after the Trial Examiner had rendered his report, a strike occurred. During the strike a union was formed which petitioned the Board for permission to intervene and filed a petition for investigation and certification of representatives.
>
> The Board denied the petition to intervene. In the administration of the Act there are long delays necessarily incident to the procedure. If the Board were to permit the opening of the record on such a petition, it would necessarily involve fur-

[16] There is no suggestion that new skills characterize petitioner's operations, that a new legitimate union has captured the allegiance of the employees, or that any other circumstances have arisen to render the plant an inappropriate forum for the Union's activities. Cf. *National Labor Relations Board* v. *National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7), certiorari denied, No. 204, this Term. Where there had been an expansion of a unit from 59 to approximately 200 employees since the failure to bargain, the Board refused to require the employer to bargain with the originally chosen representative. *Matter of Benjamin Fainblatt*, 4 N. L. R. B. 596, 600–601.

> ther delays and hinder the administration of the Act. The Supreme Court held that the Board was not in error. It is respectfully submitted that the case is distinguishable from the case at the bar. [Italics added].[17]

It further asserts, that in the *Lorillard, Machinists,* and *Bradford Dyeing* cases the Board made necessary findings as to the coercive effects of the unfair labor practices upon employees joining or retaining their membership in a labor organization (Br. 6, 14), whereas in the instant case, petitioner asserts, the Board found that "the loss [of majority] was not due to unfair labor practices" (Br. 7, 9).

We have already demonstrated that the circumstance that the intervening "other factors" than the refusal to bargain which affected the Union's majority status were a normal turnover in personnel, rather than "lapse of time and the change in the conditions" due to a strike and violence as in the *Lorillard* case,[18] does not constitute a difference of any legal consequence between the two cases. In either case, the aforementioned considerations which underlie the affirmative bargaining order are equally cogent. We have also

[17] See also petitioner's attempt to distinguish the *Machinists* case upon the basis that "the union in that case made no showing *at the hearing* that a majority * * * had shifted * * *" (Br. 7). [Italics added.]

[18] See also note 8, p. 16, *supra.*

demonstrated the consistently approving views of the circuit courts of appeals which have had recent occasion to pass upon the question. We shall now show that petitioner's reliance upon the alleged differences between the instant case and the *Lorillard* and earlier cases based upon the particular time during the course of the proceedings when the employer sought to show the alleged loss of majority, or upon the nature of the Board's findings, is also without merit.

a. *Alleged differences based upon considerations of orderly and effective administration of the Act.* It is true, as petitioner suggests (Br. 8), that in the circumstances of the *Lorillard* case effective and orderly administration of Section 8 (5) of the Act was prevented by the circuit court of appeals' modification of the Board's order. For, as the Board pointed out in its brief to this Court in that case (pp. 22–23)—

> If, as the court below held, one such claim [of loss of majority] made months after the close of the hearing must be inquired into, successive claims advanced after each succeeding hearing would likewise have to be entertained, with the result of indefinitely delaying the bargaining order and frustrating the purposes of the Act. * * * [Such] rule would necessarily "make a merry-go-round of the Act." *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 33 (App. D. C.), affirmed 311 U. S. 72.

But this consideration was not expressely relied upon by the Court in the *Lorillard* case. On the contrary, the Court held that it "was for the Board to determine" whether a bargaining order was necessary to "remedy the effect" of Lorillard's prior unlawful refusal to bargain and to effectuate the policies of the Act (314 U. S. 512). In so holding, the Court cited the *Bradford Dyeing* and *Machinists* cases. In the former case this differentiating factor upon which petitioner relies was not even present. Moreover, while it was present in the *Machinists* case, the Court did not advert to it in its opinion in that case either, but expressly held that "the failure of the Board to recognize petitioner's notice of change [in sentiment among the employees] was wholly proper" because (311 U. S. 72, 82)—

> It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates. * * *

It is thus apparent that this consideration upon which petitioner relies to differentiate the instant

case from the earlier cases was not the *ratio decidendi* of the earlier decisions, but that they proceeded upon bases which are common to all of the cases including this one.

This view is supported by the recent Circuit Court of Appeals decisions to which reference has been made (*supra*, pp. 24–27). In none of these was the factor upon which petitioner relies referred to by the court. Moreover, the *Porcelain Steels* case (138 F. (2d) 840) is squarely contrary to petitioner's contention. In that case, as has been demonstrated (p. 26, *supra*), just as in the instant case, the evidence as to loss of majority was introduced at the hearing before the Board. The court nevertheless enforced the Board's bargaining order upon the authority of the *Lorillard*, *Machinists* and *Bradford Dyeing* cases. See also the *Burke Machine Tool* decision (133 F. (2d) 618, 620). It is also noteworthy that in the *Karp Metal Products* case, 134 F. (2d) 954 (C. C. A. 2), which petitioner cites (Br. 8) as giving "weight" to its contention in this regard, the evidence of alleged loss of majority was proffered after the Board hearing and before issuance of the Board's decision and order, just as in the *Lorillard* and *Machinists* cases. In that case, too, the court apparently did not regard the "administrative" argument as conclusive, however, but remanded the case to the Board for findings as to *"how far the respondent's earlier unfair trade practices continue to vitiate any*

choice of a representative by its employees; that is for the Board [to determine]." 134 F. (2d) 954, 955. [Italics added.]

We think it clear, therefore, that considerations of effective and orderly administration of the Act are not the indispensable factors underlying the *Lorillard* decision. We submit, however; that even if they were, that fact would not distinguish this case. For considerations of effective and orderly administration of the Act are also present in situations like that presented in the instant case.

A considerable period of time necessarily intervenes in all cases between the unfair labor practices and the Board's complaint and hearing, as well as between the hearing and the Board's decision or enforcement of its order. If the employer who is unfriendly to the principles of the Act knows that he will not be required to bargain with the organization selected by the employees if that organization cannot retain its majority status during the period necessarily consumed in the Board's proceedings preliminary to hearing, he will be tempted to violate the statute in the hope that the union's majority will be lost before the Board can act. Moreover, since a premium will thus be placed upon the quick success of his efforts to coerce the employees away from the union, his efforts necessarily will be of a flagrant and provocative character. On the other hand, the union can scarcely be expected in these circumstances to

resort to the peaceful processes of the law; it will resort instead to strikes and other forceful measures. Moreover, it will be tempted, even if it does resort to legal process rather than force, to file hasty and improvident charges, and the Board will be urged to issue hasty complaints and take other quick action which might not be warranted or necessary if there were time for full investigation. Thus, the Congressional scheme and purpose in enacting the Act would be threatened and the effective administration of the statute, at least *pro tanto*, frustrated. Cf., *National Labor Relations Board* v. *Appalachian Electric Power Co.*, decided January 10, 1944 (C. C. A. 4).

b. *Alleged differences based upon Board findings.*—Petitioner's reliance upon alleged differences between the Board's findings in the instant case and its findings in the *Lorillard, Machinists* and *Bradford Dyeing* cases is also without merit. Petitioner asserts that in the instant case "the Board has found that the [Union's] loss [of majority] was not due to unfair labor practices" (Br. 7); and, further, that, "The Board found on the uncontroverted evidence that the loss of majority occurred through no unfair labor practices" (Br. 9). On the other hand, petitioner asserts (Br. 14), that in the *Lorillard* case the Board found—

> The necessary delays incident to the adjudication of a dispute have postponed the

> Board's Order until a time considerably subsequent to the original wrongful refusal to bargain. The refusal to bargain collectively disrupts the morale of the men, has a deterring effect upon the organizational activity of the Union and a discouraging influence on members already gained which tends to induce them to drop from the ranks.

Likewise, in the *Bradford Dyeing* case, petitioner points out (Br. 6), the Board found that "except for the unfair labor practices of the employer, the employees would have remained members" of the union; and in the *Machinists* case, petitioner notes (Br. 7), this Court declared:

> Where as a result of unfair labor practices a union can not be said to represent an uncoerced majority the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated.

Contrary to petitioner's assertions, the Board did not find in the instant case that the Union's loss of majority was not due to the employer's illegal conduct; on the contrary, as the court below pointed out (R. 147, 144), the Board in effect found that the alleged "loss of majority may be traced to the refusal to bargain * * *," this finding being implicit in the Board's "treatment of [petitioner's] argument" based upon the alleged loss. Thus, while the Board found (R.

25–26, n. 24) that it appeared from petitioner's evidence that a sufficient number of union members had left petitioner's employ by March 5, 1942, "to affect" the Union's majority, it further found that this showing was not "determinative" of the remedy to be ordered and that the only means by which the refusal to bargain could be remedied was an affirmative order requiring petitioner to bargain with the Union (*ibid.*). The Board stated that its determination in this regard reflected what it had "consistently held," and it cited numerous cases, including the *Lorillard, Machinists,* and *Bradford Dyeing* cases, in which such findings had been made (*ibid.*). It thus is clear from the face of the Board's decision and order that its conclusion as to the need for the usual order requiring petitioner to bargain collectively and the bases for that conclusion were in all material respects the same as those announced in the *Lorillard* and other cited cases. There is no inconsistency between the Board's view that the Union's majority was affected by the unfair labor practices, and its finding that the majority had also been affected by the turnover in personnel.

In these circumstances, it was not necessary for the Board to set out in detail all the underlying reasons of experience and policy upon which its conclusions as to the appropriate remedy rested. These were apparent from and had been

stated in the cases cited and in other cases, conclusively showing that the Board exercised its administrative judgment on the question. This was all that petitioner was entitled to. In these circumstances, we submit, the Board's findings are in all material respects the same as those present in the *Lorillard* and earlier cases, and petitioner's suggestion that the Board might have, but "for reasons known only to it" did not make such findings (Br. 15), is without merit.

4. *Petitioner's reliance upon the Fansteel and National Seal cases*—Petitioner's reliance upon *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 261–262 (Br. 4–5, 9–14), is misplaced. In that case the Board's order requiring the employer to bargain with the union rested upon the assumption that all of the discharged employees would be reinstated and those new employees who replaced them discharged. The Board did not determine that there should be an order to bargain if the discharged employees were not restored to their jobs. Nor did the Board argue before this Court that the bargaining order should be enforced were it to be held the 93 discharged employees were not entitled to reinstatement (see Board Brief, No. 436, October Term, 1938, pp. 69–70). There the intervening unlawful acts of the union members and the employer's lawful discharge for that reason of the bulk of the union

membership broke the chain of causation normally leading from the unfair labor practices to the loss of majority. The Board made no assumption that absent a restoration of the discharged strikers, the union in that case would have maintained its majority by accretions from among the old employees who remained or from new employees. The Court's refusal to enforce the bargaining order was in that case a necessary consequence of its refusal to uphold the reinstatement of the 93 strikers. On the other hand, in the instant case, as both the Board and the court below recognized, there was a clear causal connection between the unfair labor practices and the succeeding alleged loss of the Union's majority (pp. 19–24, *supra*).

Petitioner also relies (Br. 8–9) upon *National Labor Relations Board* v. *National Seal Corp.*, 127 F. (2d) 776 (C. C. A. 2). The case is not in point. It involved the question of the propriety of the trial examiner's ruling as to the admissibility of evidence of the union's loss of majority status. The court held that the trial examiner's ruling excluding it was proper for technical reasons, and enforced the Board's bargaining order. Petitioner says that (Br. 9), "The inference is clear that the [Second Circuit] Court's decision would have been different if the respondent had presented substantial evidence of loss of majority not due to unfair labor practices." But whatever "inference" may be

drawn from the language of the opinion in that case, the fact is that when the court was subsequently faced with situations involving losses of majority similar to those involved in the instant case, it upheld the Board's bargaining order. See *National Labor Relations Board* v. *Karp Metal Products Co., Inc.*, enforcing without opinion, October 23, 1943, 51 N. L. R. B. 621, pending on certiorari, No. 602, this Term; *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, certiorari granted, No. 265, this Term.

5. *The Circuit Courts of Appeals have uniformly upheld the duty of an employer to bargain with a designated representative for a reasonable period of time irrespective of its majority status at the time bargaining occurs.*—The fact that the Board's order requires petitioner to bargain collectively with a union which may not be the choice of the majority of the employees in the unit at the time bargaining takes place does not in itself render the order improper. Even in instances where the employer has committed no unfair labor practice, he is often required to bargain with a labor organization which may in fact not be the actual choice of the majority of the employees at the time. The workability of collective bargaining requires that some degree of stability attend the designation of a representative. If a designated representative loses his status when-

ever employees change their minds or personnel in the unit shifts as a result of a normal turnover, the whole scheme of collective bargaining envisaged by the Act becomes impracticable.[19] In holding that once a representative is selected by a majority of employees, the representative status must continue until a reasonable period of genuine bargaining has elapsed, the Circuit Court of Appeals for the Second Circuit stated (*National Labor Relations Board* v. *Century Oxford Manufacturing Corp.*, decided February 15, 1944):

> The purpose of the Act is to insure collective bargaining for employees * * * Inherent in any successful administration of such a system is some measure of permanence in the results: freedom to choose a representative does not imply freedom to turn him out of office with the next

[19] The National Labor Relations Board treats the administrative ascertainment of a representative as binding for at least a year absent some special circumstance. Fifth Annual Report of the National Labor Relations Board, 1940, p. 35; cf. Eighth Annual Report of National Mediation Board—1942, pp. 6–7; *Matter of International Ass'n of Oil Field, Gas Well, and Refinery Workers of America, Local No. 284 and Lion Oil Refining Company*, Case No. 74, Decisions of the Petroleum Labor Policy Board (Govt. Print. Off. 1935), pp. 34, 37. However, in plants which are experiencing rapid changes such as those incident to conversion to war production, the Board has not applied its one year rule but has made more frequent determinations of the actual choice of the employees respecting representation. Seventh Annual Report of the National Labor Relations Board—1942, p. 56. Cf. *Matter of Westinghouse Electric Co.*, 38 N. L. R. B. 404.

> breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise.

To the same effect see *National Labor Relations Board* v. *Applachian Electric Power Co.*, decided January 10, 1944 (C. C. A. 4); *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876, 881–882 (C. C. A. 3), certiorari denied, 319 U. S. 751.

The Board has found that the holding of employees to their original choice until there has been an opportunity for bargaining vindicates the policies of the Act. This clearly appears from a study of subsequent bargaining relations in cases in which a court required bargaining despite a claim that the representative with whom it ordered the employer to bargain had lost its actual majority status prior to the court's order. The subsequent history of bargaining in each of thirty-two such cases is set out in Appendix B, pp. 48–51, *infra*. In a majority of the cases the employer and the union have entered into collective bargaining contracts, many of which have been renewed from year to year. In four cases subsequent petitions for elections filed, in three cases by a union other than the one with which the employer was directed to bargain, and in one by the latter, were entertained by the Board and elections held.[20] The

[20] This occurred in the cases of *Biles-Coleman*, *Louisville Refining*, *Blanton*, and *Ritzwoller*; see footnotes 7, 9, and 10 in Appendix B, *infra*, p. 50.

results of the study show that the Board's manner of administering this question has proved workable, affording both an opportunity to develop a stable relationship with the union which had been the victim of the unfair labor practice and a subsequent opportunity for determining any change in representation which the employees bring to the attention of the Board.

No unusual circumstance marks this case as different from those included in the study. Indeed, in the instant case there has been a relatively minor turnover of personnel in the unit subsequent to the choice by the majority of the employees of the Union and the unfair labor practices which followed immediately after that choice. Of the 80 employees in the unit at the time of the unfair labor practices, 23 have left petitioner's employ and 28 new persons have been hired. Of the 45 employees who designated the Union as their representative, 32 remain in petitioner's employ and there is no showing that any of them has either revoked his designation of the Union or ceased to desire it to represent him. Thus, excluding the new employees, the 32 remaining Union members constitute a mathematical majority of the 57 old employees. There has been no showing that any of the other 25 old employees who were present at the time of the unfair labor practices have any objection to the Union acting as their representative. Nor is there any showing

that any of the 28 new employees who from time to time replaced old employees leaving petitioner's employment object to such representation. All of these employees have doubtless been informed that the Board has determined that the Union is in law their bargaining representative. None of them has chosen to object either to the Board or the Court. Under these circumstances the Board's order seems eminently proper. For even in cases where employees were objecting,[21] this Court has held that the wisdom of remedying a refusal to bargain by requiring bargaining with the last freely chosen representative is for the Board and not the courts to determine.

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[21] In the *Bradford Dyeing* case the competing Federation was before the Board, the Circuit Court of Appeals for the First Circuit, and this Court, urging that it was the true representative of the employees (Record, No. 588, October Term 1939, pp. 21–22; 106 F. (2d) 119; Brief of Federation in Opposition to Certiorari, pp. 4–6; Brief of Federation on the Merits, p. 18; 310 U. S. 318); in the *Machinists* case the employer accepted and complied with the Board's order, and was not even a party to any of the court proceedings, in which the competing union was the party litigant (110 F. (2d) 29, 32; 311 U. S. 72, 74); in the *Lorillard* case an unaffiliated union sought to intervene before the Board claiming it represented the employees, and the Circuit Court of Appeals for the Sixth Circuit held that the Board should have held an election to determine which union was the actual choice of the employees (117 F. (2d) 921, 925–926).

CONCLUSION

The instant case is in all essential respects identical with the situation presented in *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, and is clearly controlled by the rationale of that decision and earlier cases. Accordingly, the court below properly enforced the Board's bargaining order, and its decree should be affirmed.

Respectfully submitted.

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FEBRUARY 1944.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.
>
> * * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

APPENDIX B

STUDY OF CASES IN WHICH COURTS HAVE ENFORCED ORDERS REQUIRING BARGAINING DESPITE CLAIMS THAT THE UNION HAD LOST ITS MAJORITY DESIGNATION [1]

I. Total cases in group [2] 42
A. Cases eliminated from study 10
1. Pending in Supreme Court 4
Crown Can Co., 138 F. (2d) 263, 267 (C. C. A. 8).
Franks Bros. Co., 137 F. (2d) 989.
Karp Metal Products Co., Inc., 134 F. (2d) 954 (C. C. A. 2).
Medo Photo Supply Co., 135 F. (2d) 279 (C. C. A. 2).
2. Employer has indicated he will petition for certiorari 2
Great Southern Trucking Co., decided September 23, 1943 (C. C. A. 4).
Poultrymen's Service Corp., 138 F. (2d) 204, 211 (C. C. A. 3).
3. Company out of business 2
Crystal Spring Finishing Co., 116 F. (2d) 969 (C. C. A. 1).
Williams Motor Co., 128 F. (2d) 960 (C. C. A. 8).
4. No information on contract status 2
Hartsell Mills Co., 111 F. (2d) 291 (C. C. A. 4).
Highland Park Mfg. Co., 110 F. (2d) 632 (C. C. A. 4).
B. Number of cases included in study 32

[1] This material was prepared under the direction of Dr. Emily C. Brown, Operating Analyst, National Labor Relations Board, in connection with studies of the extent of collective bargaining following certain types of cases handled by the Board. For a description of these studies see Eighth Annual Report of the National Labor Relations Board, 1943, pp. 68–73.

[2] Only those cases in which the Circuit Court of Appeals decree was entered prior to January 1, 1944, are included.

II. Cases in which contract was signed after court decree..... 26

A. Contract with union with which employer ordered to bargain still in effect..... 18

1. Original contract..... 7

Burke Machine Tool Co., 133 F. (2d) 618, 621 (C. C. A. 6).

Bussmann Mfg. Co., 111 F. (2d) 783, 788 (C. C. A. 8).

Calumet Steel Div. Borg Warner Corp., 121 F. (2d) 368, 370 (C. C. A. 7).[3]

Dixie Motor Coach Corp., 128 F. (2d) 201, 202 (C. C. A. 5).

Tebel Bottling Co., 129 F. (2d) 250, 254 (C. C. A. 8).

Valley Mould and Iron Corp., 116 F. (2d) 780, 765 (C. C. A. 7).

Windsor Mfg. Co. (Oughton), 118 F. (2d) 498, 498 (C. C. A. 3).[3][4]

2. Renewed contract..... 11

a. Renewed once..... 6

Colorado Fuel & Iron Corp., 121 F. (2d) 165, 175-176 (C. C. A. 10).[5]

Continental Oil Co., 113 F. (2d) 473, 480-481 (C. C. A. 10).[4]

P. Lorillard Co., 314 U. S. 512.

Moltrup Steel Prod. Corp., 121 F. (2d) 612, 618 (C. C. A. 3).[4]

Norristown Box Co., 124 F. (2d) 429 (C. C. A. 3).

Swift & Co. (Neuhoff Packing), 127 F. (2d) 30, 32 (C. C. A. 6).

b. Renewed twice..... 3

Bradford Dyeing Association, 310 U. S. 318, 339-340.[4]

George P. Dilling & Sons Co., 119 F. (2d) 32, 39 (C. C. A. 3).

Sunshine Mining Co., 110 F. (2d) 780 (C. C. A. 9).[4]

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[3] This case had contract as result of W. L. B. action.

[4] This contract has recently expired and indications are that it will soon be renewed.

[5] There are two units involved in this case. In one unit there has not been time for renewal of the contract.

[6] This case had contract continued by W. L. B. action.

II. Cases in which contract was signed, etc.—Continued.
A. Contract with union, etc.—Continued.
2. Renewed contract—Continued.
c. Renewed three times ---------- 1
Kiddie Kover Mfg. Co., 105 F. (2d) 179 (C. C. A. 6).
d. Renewed four times ---------- 1
International Ass'n of Machinists, 311 U. S. 72.
B. Contract with union with which employer ordered to bargain expired; contract with another union still in effect ---------- 2
1. Contract with charging union renewed once ---------- 2
Biles-Coleman Lumber Co., 96 F. (2d) 197, 198 (C. C. A. 9).[7] (Contract with other union renewed twice.)
Chicago Apparatus Co., 116 F. (2d) 753, 758 (C. C. A. 7).[8] (No time for renewal.)
C. Contract with another union only—still in effect. 2
1. Renewed once ---------- 1
Blanton Co., 121 F. (2d) 564, 569 (C. C. A. 8).[9]
2. Renewed twice ---------- 1
M. H. Ritzwoller Co., 114 F. (2d) 432, 437–438 (C. C. A. 7).[9]
D. Contract with union with which employer ordered to bargain—expired ---------- 4
1. Renewed once ---------- 1
Louisville Refining Co., 102 F. (2d) 678 (C. C. A. 6).[10]
2. Not renewed ---------- 3
Reed & Prince Mfg. Co., 118 F. (2d) 874, 880 (C. C. A. 1).

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[7] Renewed contract with charging union expired 7–28–40; on 7–24–40, charging union lost election to other union (petitioner), which obtained a 2-year contract (9–30–40). A consent election was lost (3–12–42) by the charging union (petitioner) to the other union, whose contract was renewed 7–27–42.

[8] Both the charging union—Federation of Architects, Engineers, Chemists and Technicians—and the other union—United Electrical, Radio and Machine Workers—are C. I. O. affiliates.

[9] The members of the charging union changed their affiliation, and shortly after the court decree an election in which the charging union did not participate was won by the other union.

[10] Contract was renewed for period of 4 months. As result of employer's demand for proof of majority, charging union petitioned for election in two successive years and lost both elections. No other union was involved.

II. Cases in which contract was signed, etc.—Continued.
D. Contract with union, etc.—Continued.
2. Not renewed—Continued.
Somerset Shoe Co., 111 F. (2d) 681, 690-691 (C. C. A. 1).
Texarkana Bus Co., 119 F. (2d) 480 (C. C. A. 8).[11]

III. Cases in which no contract was signed after court decree ---- 6
A. Cases in which bargaining did not result in a contract ---- 4
Federbush Co., 121 F. (2d) 954, 956 (C. C. A. 2).
Clinton E. Hobbs Co., 132 F. (2d) 249, 252 (C. C. A. 1).
New Era Die Co., 118 F. (2d) 500, 505 (C. C. A. 3).
Whittier Mills Co., 111 F. (2d) 474, 478 (C. C. A. 5).
B. Cases in which union did not seek to bargain after court decree ---- 2
Riverside Mfg. Co., 119 F. (2d) 302 (C. C. A. 5).
Schreiber Milling & Grain Co., 106 F. (2d) 1008 (C. C. A. 8).[12]

[11] Contract was terminated upon written request of union after it had run for 6 months.

[12] This case differs from the others studied, in that there was a contract after a consent decree, but not after a contempt decree.

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SUPREME COURT OF THE UNITED STATES.

No. 521.—October Term, 1943.

Franks Bros. Company, Petitioner, vs. National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 10, 1944.]

Mr. Justice Black delivered the opinion of the Court.

The single question presented is whether the National Labor Relations Board acted within its statutory authority in ordering petitioner to bargain collectively with a union which had lost its majority after petitioner wrongfully had refused to bargain with it.

In June 1941 forty-five of the eighty production and maintenance employees in petitioner's clothing factory designated the Amalgamated Clothing Workers of America as their bargaining representative. Attempts of the Union to negotiate with petitioner proved unsuccessful because of the latter's refusal to bargain, and the Union filed with the Board a petition for an investigation and certification of representatives. A consent election was scheduled for July 25, and notices posted. Before the election was held, petitioner conducted an aggressive campaign against the Union, even to the extent of threatening to close its factory if the Union won the election. Thereupon the Union withdrew its petition for an election, and filed charges with the Board alleging that petitioner had engaged in unfair labor practices.

In the following months various conferences were held and correspondence exchanged between petitioner and the Board in an unsuccessful effort to persuade the petitioner to cease opposition to the Union. Finally on March 2, 1942, the Board issued a complaint against petitioner. Hearings on the complaint were conducted at length, and in October 1942 a final order was entered. The finding of the Board, not here challenged, was that the foregoing conduct of petitioner, together with related conduct un-

necessary to be detailed, constituted unfair labor practices within the meaning of Section 8(1) and (5) of the National Labor Relations Act; 49 Stat. 449, 452, 453; 29 U. S. C. § 158(1) and (5).

In reaching its conclusion as to the appropriate remedy for these unfair practices, the Board considered petitioner's contention that during the seven month interval between the filing of the charges and the issuance of the complaint, thirteen of the Union's original members had been replaced by new employees in the normal course of business. This left the Union with only thirty-two of the eighty-five employees then in the unit which it represented, or less than a majority. But the Board found that the Union's lack of a majority was "not determinative of the remedy to be ordered." Citing many of its previous decisions involving similar situations, the Board concluded that "the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed." 44 N. L. R. B. 898, 917. Accordingly, because it deemed such a provision "necessary to effectuate the policies of the Act", the Board included in its order a requirement that petitioner bargain collectively with the Union. The Circuit Court of Appeals upheld the Board, and directed enforcement of the order. 137 F. 2d 989. To consider an alleged inconsistency between the Circuit Court's decision and our decision in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 261-262, we brought the case here for review. 320 U. S. 734.

We think the decision of the Circuit Court correct under the Act and consistent with past decisions of this Court. Little need be added to what has been said on this subject in other cases. Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain. See, *e. g.*, *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, 815-816; *Matter of*

P. Lorillard Company, 16 N. L. R. B. 684, 699-701. One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act. See 29 U. S. C. § 160(a) and (c). And, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

That determination the Board has made in this case and in similar cases by adopting a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership, indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which is has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. See 29 U. S. C. § 160(a) and (c).

Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Company* v. *National Labor Relations Board*, 139 F. 2d 984, 987. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. See *National Labor Relations Board* v.

Appalachian Electric Power Co., 140 F .2d 217, 220-222; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881-882. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. *Id.*; see 29 U. S. C. § 159(c).

That issuance of the order challenged by petitioner lay within the Board's discretion is settled by our holding in *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 513. The *Lorillard* case, argues petitioner, is distinguishable because in that case the Court pointed to the fact that, "The Board had considered the effect of a possible shift in membership. . . ." *Id.*, 513. But in this case also the Board considered the change in membership, and in addition relied in part upon the *Lorillard* decision to support its order. We find no possible valid distinction between this and the *Lorillard* case.

Nor is the *Lorillard* decision inconsistent with the earlier holding in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. In the latter case the Board's order to bargain with the union rested in part on its finding that the company should reinstate ninety-three discharged union members. The Board had not determined in that proceeding, nor did it argue in this Court, that the company should be compelled to bargain with the union if these ninety-three employees were denied reinstatement. After this Court, contrary to the Board's conclusion, held that these employees properly were denied reinstatement, the situation was the same as if the Board had not considered the effect of the change in union membership. Cf. *N. L. R. B.* v. *P. Lorillard Co.*, *supra*.

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.